UNITED NATIONS

GENERAL ASSEMBLY

Distr.
GENERAL

A/CN.9/SR.495
13 July 1993

ORIGINAL: ENGLISH

UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-sixth session

SUMMARY RECORD OF THE 495th MEETING

Held at the Vienna International Centre, Vienna,
on Monday, 5 July 1993, at 2 p.m.

Chairman: Mr. MOHAMMED (Nigeria)

CONTENTS

New international economic order: procurement (continued)

Consideration of draft Model Law on Procurement (continued)

Article 2 (continued)

Article 3

Article 4

Article 5

Article 6

This record is subject to correction.

Corrections should be submitted in one of the working languages. They should be set forth in a memorandum and also incorporated in a copy of the record. They should be sent within one week of the date of distribution of this document to the Secretary of the Commission, room E0455, Vienna International Centre.

Any corrections to the records of the meetings of this session will be consolidated in a single corrigendum, to be issued shortly after the end of the session.

V.93 87311 5724E

Distr.: 15 July 1993

...

The meeting was called to order at 2.05 p.m.

NEW INTERNATIONAL ECONOMIC ORDER: PROCUREMENT (continued) (A/CN.9/371, A/CN.9/375, A/CN.9/376 and Add.1, A/CN.9/377)

Consideration of draft Model Law on Procurement (continued)

Article 2 (continued)

1. Mr. JAMES (United Kingdom), referring to the remarks made at the end of the previous meeting by the representative of Canada with regard to paragraph (c), said that he could go along with the idea of specific inclusions within the definition of "goods" but not with the idea of specific exclusions.

2. The draft Model Law already contained, in article 1, a provision enabling enacting States to exclude certain types of procurement from the Model Law's scope of application, and, if States were permitted to exclude certain items from the definition of "goods", the result might well be the exclusion of entire markets from the scope of application. The Guide to Enactment should therefore make it clear that any reference in square brackets to the exclusion of certain items was not intended to enable States to preclude the application of the Model Law to cases where no such effect was intended in article 1.

3. Mr. TUVAYANOND (Thailand) said that it might be useful if enacting States were enabled to exclude certain items. For example, a country wishing to procure electricity from another country as a means of assisting it financially would not wish to go through the procurement procedures envisaged in the Model Law, which could not take such political considerations into account. States should be free to decide which items to include in and exclude from the definition of "goods".

4. Ms. ZIMMERMAN (Canada) proposed the following additional wording, to be placed at the end of paragraph (c) after the word "electricity": "[and without limiting the generality of the foregoing, includes ... but does not include ...]". The purpose of her delegation's proposal was not to enable States to exclude entire markets from the Model Law's scope of application, but to enable them to make an appropriate distinction between goods and services. That should be made clear in the Guide to Enactment.

5. Mr. MORAN BOVIO (Spain), agreeing with the Canadian representative about the need to make the purpose of the proposed additional wording - if accepted - clear, said that limitations of the Model Law's scope of application could be achieved through the formulation of article 1, certain types of procurement, such as the procurement of electricity supplies, being excluded.

6. Mr. WALLACE (United States of America), noting what the Canadian representative had said about the purpose of her delegation's proposal, reminded the Commission that, if it took up the question of the procurement of services at some later date, it would have to consider the distinction between goods and services in that context.

7. The CHAIRMAN thought there would be little difficulty in adding to paragraph (c) the wording proposed by the delegation of Canada. On the other hand, article 1 could be amended in order to enable enacting States to specify in their own legislation which items were embraced or excluded by the concept "goods".

8. Mr. LEVY (Canada) said that subparagraph (1) (c) of article 1 could be used in order to exclude entire categories of goods. That was not the purpose of his delegation's proposal.

9. Mr. JAMES (United Kingdom), welcoming the Chairman's suggestion regarding article 1, said that the definition in paragraph (c) of article 2 should not be tampered with. If States wished to exclude certain markets, they should be obliged to do so under the provisions of article 1. The scope of the Model Law must be clear, leaving no room for enacting States to add or subtract certain categories.

10. Mr. TUVAYANOND (Thailand) also welcomed the Chairman's suggestion.

11. Ms. ZIMMERMAN (Canada) asked how the Chairman proposed to amend article 1.

12. Mr. SAHAYDACHNY (Secretariat) said that one way of resolving the issue currently before the Commission might be to add the following wording after the word "electricity" in paragraph (c) of article 2: "[the enacting State may specify in this law additional items that it considers to be goods, or items that it does not consider to be goods]".

13. Mr. JAMES (United Kingdom) said that in his view the wording just read out would be better placed in article 1, which was where the question of inclusions and exclusions should be dealt with.

14. The CHAIRMAN, agreeing with the representative of the United Kingdom, said that a definition providing for inclusions and exclusion would not, strictly speaking, be a definition at all. That was why he had suggested amending article 1.

15. Mr. TUVAYANOND (Thailand), also agreeing with the representative of the United Kingdom, said it would be logical to place the wording just read out at the end of subparagraph (2) (c) of article 1.

16. Mr. LEVY (Canada), pointing out that paragraph (2) of article 1 was concerned only with exclusions, and not with inclusions, said that his delegation's proposal was not aimed at limiting or adding to the Model Law's scope of application. It merely sought to help enacting States which might need to distinguish between goods and services in certain doubtful situations.

17. Amending article 1 in the way suggested would result in an article dealing not only with the exclusion of types of procurement but also with the exclusion - and inclusion - of different items. It would be easier if individual States could specify in their legislation what was or was not considered a "good".

(Mr. Levy, Canada)

18. He thought that the additional wording which his delegation had proposed made for greater clarity, but if the Commission thought otherwise his delegation would accept the fact.

19. Mr. GRUSSMANN (Austria) said that a model law should contain definitions that were as universal as possible. He therefore also agreed with the representative of the United Kingdom.

20. Mr. HERRMANN (Secretary of the Commission) said that provision was already made for exclusions in paragraph (c) of article 1 and that to provide for inclusions in that article might change the Model Law's scope of application. On the other hand, certain delegations were hesitant about the definitional approach advocated by the Canadian delegation.

21. Everyone would no doubt agree that the objective behind the Canadian proposal was a good one: a State should be able to make it clear whether, for example, printing was regarded as a good or a service. That being so, it might be better to mention printing and one or two other borderline cases after "electricity" in paragraph (c) of article 2 so as to trigger the thinking of enacting States.

22. There was, in his view, no need to say much in the Guide to Enactment about the reasons for the additions. In his experience, States were not very interested in the reasons for such changes.

23. Mr. ANDERSEN (Denmark) suggested that computer software might be one of the borderline cases mentioned after "electricity".

24. Mr. TUVAYANOND (Thailand) agreed about the mentioning of computer software but was doubtful about printing, which he felt could be regarded only as a service.

25. The CHAIRMAN asked the representative of Canada whether her delegation, in a spirit of compromise, could accept the inclusion in article 1 of the wording proposed shortly before by the Secretariat. In that connection, he understood that the idea of placing the definitions before the article concerning the Model Law's scope of application had been mooted.

26. Ms. ZIMMERMAN (Canada) said that the wording was acceptable since in substance it served the same purpose as the wording proposed by her delegation. Placing it in article 1, however, might lead to misinterpretation on the part of States; also, it would be necessary to include a cross-reference to the definition of "goods".

27. The CHAIRMAN suggested that the matter be set aside for the time being. Turning to paragraph (d) of article 2 and observing that no delegation had asked for the floor, he took it that the Commission wished to adopt that paragraph as it stood.

28. It was so decided.

29. The CHAIRMAN invited comments on paragraph (e) of article 2.

30. Ms. ZIMMERMAN (Canada) said that use of the expression "supplier or contractor" throughout the draft Model Law appeared to be unnecessary since the "supplier" and the "contractor" were the same entity. She felt it would be sufficient to refer simply to the "supplier".

31. Mr. WALLACE (United States of America) said that the question just raised had been discussed repeatedly during recent years. In the United States of America at least, there was a distinction: a supplier provided goods, whereas a contractor carried out civil engineering and similar work. He felt it would be preferable to retain the expression "supplier or contractor".

32. Mr. LEVY (Canada) said that his delegation did not wish to press the point, which was one of drafting, but that it would be happy if a more suitable expression could be found.

33. Mr. KLEIN (Observer for the Inter-American Development Bank) suggested that "tenderer" or "bidder" might be a suitable alternative.

34. The CHAIRMAN said he understood that the Canadian delegation was willing to accept retention of the expression "supplier or contractor", and he therefore took it that the Commission wished to adopt paragraph (e) of article 2 as it stood.

35. It was so decided.

36. The CHAIRMAN, observing that there were no comments on paragraph (f) of article 2, took it that the Commission wished to adopt that paragraph as it stood.

37. It was so decided.

38. The CHAIRMAN, recalling the discussion regarding paragraph (g) of article 2 at the previous meeting (see A/CN.9/SR.494, paras. 55-59), said that the Secretariat wished to propose an amendment to that paragraph.

39. Mr. SAHAYDACHNY (Secretariat) said that the proposed amendment concerned functions of a tender security which were envisaged in subparagraph (1) (f) of article 27 but not in paragraph (g) of article 2. It was proposed that after the words "if the contract is awarded to the supplier or contractor" the following wording be added: "not to withdraw or modify a tender after the deadline for submission of tenders, and, if required to do so, to provide a security for the performance of the procurement contract or to comply with any other condition precedent to the signing of the procurement contract specified in the solicitation documents; it includes such arrangements as bank guarantees ..." .

40. Mr. JAMES (United Kingdom) suggested that a more structured definition of "tender security" might be devised in the drafting group, if the Commission set one up.

41. The CHAIRMAN proposed that the formulation of paragraph (g) of article 2 be referred to the drafting group which the Commission would no doubt be setting up.

42. It was so agreed.

43. The CHAIRMAN, observing that there were no comments on paragraph (h) of article 2, took it that the Commission wished to adopt that paragraph as it stood.

44. It was so decided.

45. The CHAIRMAN said that in the light of informal consultations it was proposed that the following addition be made at the end of paragraph (c) of article 2: "[enacting States may include additional categories of goods]".

46. Mr. MORAN BOVIO (Spain) welcomed the proposed additional wording.

47. Mr. GRIFFITH (Observer for Australia) said that he could go along with the proposed additional wording, although he was not sure whether it was necessary. At all events, the purpose of the wording would have to be made clear in the Guide to Enactment. In particular, it would have to be made clear whether the word "includes" at the beginning of paragraph (c) was all-embracing or simply introduced an incomplete list.

48. Mr. KLEIN (Observer for the Inter-American Development Bank) suggested that "such items as" be inserted after "includes".

49. Mr. PEREZNIETO CASTRO (Mexico) supported that suggestion.

50. Mr. JAMES (United Kingdom), expressing support for the proposal read out by the Chairman, said that, while he had no objection to the suggestion made by the Observer for the Inter-American Development Bank, which might be appropriate in a civil law setting, the word "includes" already implied - in a common law setting - that what followed was an incomplete list. On the other hand, the list of items in paragraph (c) was so comprehensive that one might consider replacing "includes" by "means" - the word used in all but one of the other definitions.

51. Mr. HERRMANN (Secretary of the Commission) said that the use of "includes" in two definitions and of "means" in the remainder implied that "includes" introduced an incomplete list; that was particularly so in the case of paragraph (h), where "includes" could not possibly be replaced by "means".

52. It would not be a good idea to add the words "such items as" after "includes" in paragraph (c), as users of the Model Law might jump to the conclusion that, where "includes" appeared without "such items as", the Commission intended that the word should be all-embracing.

53. Mr. GRIFFITH (Observer for Australia) said that, in the light of the point made by the Secretary, he felt that - unless difficulties arose in a civil law setting - the word "includes" should remain, without the addition of "such items as".

54. The CHAIRMAN took it that the Commission wished to adopt the text of paragraph (c) as it appeared in the annex to document A/CN.9/371 together with the additional wording which he had read out shortly before.

55. It was so agreed.

Articles 3 and 4

56. Articles 3 and 4 were approved.

57. Mr. WALLACE (United States of America) said that his delegation believed that it might be appropriate to add, between articles 4 and 5, an article concerning the use of electronic data interchange (EDI) in procurement. He therefore wished to alert the Commission to the fact that his delegation intended to raise the matter when the Commission came to consider article 9.

58. The CHAIRMAN said he trusted that the United States delegation would make a draft text available when it raised the matter of the use of EDI in procurement.

59. Mr. LEVY (Canada), welcoming the statement made by the United States representative, said that his own delegation intended to make proposals regarding that matter when the Commission came to consider articles 9 and 25, but it would have no objection to the addition of an article earlier in the Model Law.

60. The CHAIRMAN suggested that all proposals concerning the use of EDI be considered during the discussions on articles 9 and 25.

61. It was so agreed.

Article 5

62. Article 5 was approved.

Article 6

63. The CHAIRMAN, observing that there were no comments on paragraph (1), took it that the Commission wished to adopt it as it stood.

64. It was so decided.

65. Ms. ZIMMERMAN (Canada) proposed that in subparagraph (2) (d) the words "in this State" be replaced by "in any State", as the procuring entity might also be interested in knowing whether the supplier or contractor had failed to pay taxes and/or social security contributions in States other than that of the procuring entity. It might not be easy to obtain such information, but at least the possibility of trying to obtain it should not be ruled out.

66. Turning to subparagraph (2) (e), she said that the text as it stood could give rise to an anomalous situation: a supplier or contractor might qualify under the terms of that subparagraph even though one or more directors or

(Ms. Zimmerman, Canada)

officers were currently serving prison sentences for criminal offences related to their professional conduct. She therefore proposed the insertion of the following text after "period of ... years": "or while a sentence is being served for the offence, whichever is the greater".

67. Mr. BONELL (Italy), expressing support for both proposals made by the delegation of Canada, said that the Italian Parliament was about to enact rules along similar lines.

68. Mr. WALLACE (United States of America) said that, while his delegation supported the proposal relating to subparagraph (2) (e), it feared that the other proposal would in effect result in the procuring entity being authorized to police compliance with tax laws and similar legislation in all countries.

69. Mr. JAMES (United Kingdom), supporting the proposal relating to subparagraph (2) (e), said it might nevertheless be advisable to introduce a change making it clear that only current directors or officers were meant.

70. He agreed with the delegation of the United States regarding the other proposal; it would be wrong, for example, to allow procuring entities to use a dispute between a company and the tax authorities as a reason for excluding that company.

71. Mr. BONELL (Italy), reiterating his support for the Canadian proposals, pointed out that in the early part of paragraph (2) it was stated only that "the procuring entity may require ...". Information regarding the tax payment situation of a potential supplier or contractor could be important, and the procuring entity would do well to take into account any such information it might receive.

72. With regard to subparagraph (e), he felt that it might not be necessary to introduce the change envisaged by the United Kingdom representative; the text as it stood appeared to meet his concern.

73. Mr. LEVY (Canada), referring to the proposed amendment to subparagraph (2) (d), said his delegation, which recognized that a supplier or contractor might be involved in a legitimate dispute regarding tax payments, wished to avoid situations where the procuring entity was dealing with tax evaders. Perhaps the insertion of the word "lawful" before "obligations" would meet the concerns of the United States and United Kingdom representatives.

74. With regard to subparagraph (2) (e), he agreed with what the representative of Italy had just said. It was also his delegation's understanding that the text as it stood referred only to current directors or officers.

75. Mr. MORAN BOVIO (Spain) said that, in his opinion, the proposed amendment of "in this State" to "in any State" in subparagraph (2) (d) was not a good idea; it would simply make it easier for the procuring entity to reject tenders from certain suppliers or contractors.

76. Mr. GRIFFITH (Observer for Australia) said he did not think the addition of the word "lawful" in subparagraph (2) (d) would be very helpful, and he favoured retention of the present text.

77. With regard to subparagraph (2) (e), he imagined that any director or officer serving a prison sentence for a criminal offence related to his professional conduct would have been dismissed by the supplier or contractor. He wondered whether the use of a formulation such as "and the directors and officers are of good character" might not suffice.

78. Mr. WALLACE (United States of America) said he also felt that subparagraph (2) (e) should remain unchanged. Alternatively, the subparagraph could be deleted or something on the lines of "including a failure to pay taxes or social security contributions" be inserted in subparagraph (2) (e) after the words "criminal offence".

79. With regard to subparagraph (2) (e), following the comments by the observer for Australia he now thought that the text should be left as it stood.

80. Mr. LEVY (Canada) said that the problem with words such as "of good character" lay in their subjectivity and that the purpose of the Canadian proposal relating to subparagraph (2) (e) was to deal with cases where the length of the sentence being served by a current director or officer exceeded the number of years inserted by the enacting State in that subparagraph.

81. Mr. JAMES (United Kingdom) said he could not go along with the idea of using the words "of good character"; a director or officer convicted of - say - a sex offence could not be regarded as being of good character, but such a conviction would be irrelevant for the purposes of subparagraph (2) (e).

82. The crux of the matter was whether the individual concerned was a current director or officer, and he agreed with the observer for Australia that, in practice, a convicted director or officer would probably have been dismissed by the supplier or contractor.

83. On reflection, he felt it would be better to keep the text of subparagraph (2) (e) as it stood.

84. The CHAIRMAN wondered whether the insertion of "current" before "directors or officers" might help.

85. Mr. WALLACE (United States of America) suggested that the text of subparagraph (2) (e) be left as it stood.

86. Mr. LEVY (Canada) said that, in a spirit of compromise, his delegation would withdraw its proposed amendments to subparagraphs (2) (d) and (e).

87. The CHAIRMAN said he assumed that the Commission wished to adopt subparagraphs (2) (d) and (e) as they stood.

88. It was so decided.

The meeting rose at 5.05 p.m.